No. 94-1238

(4)

In The Supreme Court of the United States

OCTOBER TERM, 1994

WILLIE LLOYD TURNER,
Petitioner,

v.

JOHN JABE, Warden,
Greenville Correctional Center,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In an effort to deflect the Court from considering the constitutional infirmities of Virginia's vileness aggravating factor, the Brief In Opposition To Petition For A Writ Of Certiorari (the "Opposition Brief") presents two questions for consideration beyond those presented in the Petition. The Opposition Brief first argues, without basis, that Petitioner's questions presented are barred under the "new rule doctrine" from *Teague v. Lane*, 489 U.S. 288 (1989). The Opposition Brief then asserts that Petitioner has procedurally defaulted on his claims. After detailed consideration, the Court of Appeals correctly rejected both of these arguments in the opinion below. (Pet. App. 7a-36a.) To the extent the Commonwealth now seeks reversal of those rulings, it should have filed a cross-petition seeking review from this Court. To the extent

the Opposition Brief is not a cross-petition for certiorari review (see Supreme Court Rule 12.3), the Court of Appeals opinion stands, and the "new rule doctrine" and procedural default issues are not properly before this Court.

1. In any event, the Commonwealth's *Teague* argument is nothing more than a circular contention that any issue that might be worthy of this Court's consideration is necessarily a "new" issue that cannot be pursued in habeas proceedings. Yet *Stringer v. Black*, 112 S. Ct. 1130, 1135-36 (1992), held that there is no new rule for *Teague* purposes when a court applies constitutional principles from *Godfrey v. Georgia*, 446 U.S. 420 (1980), to another death penalty scheme. That is precisely what Petitioner asks this Court to do. Nor is there any substance to the Commonwealth's claim that granting relief here would upset prior rulings of the Fourth Circuit, thus creating a new rule. In *Perry v. Lynaugh*, 492 U.S. 302, 314-15, 318-19 (1989), this Court squarely rejected a similar argument, holding that the petitioner did not seek a new rule simply because he sought the application of a preexisting rule to a new setting, even if the court of appeals had previously reached another conclusion. The fact that this Court has previously declined opportunities to review Virginia's vileness aggravating factor in other cases does not support the Commonwealth's argument against this Petition. Denial of a writ of certiorari is entitled to no precedential weight on the merits of the questions presented. *See, e.g., Barber v. Tennessee*, No. 94-7254, 1995 WL 67506 (U.S. Feb. 21, 1995) (Stevens, J.) (clarifying that denial of certiorari has no precedential effect and does not mean constitutional challenge to aggravating factor lacks merit). Furthermore, all of the other denials of certiorari cited in the Opposition Brief are cases in which juries found both vileness and future dangerousness, i.e., both aggravating factors available under the Virginia statutory scheme. In all of those cases, the Commonwealth argued that this Court need not reach

the merits of the vileness factor because in a non-weighing state the death penalty can be sustained on one aggravator —there future dangerousness—alone. Because this Petition involves *only* vileness, it presents the best opportunity to date for this Court to address the constitutional problems inherent in that factor.

There is also no basis for the Commonwealth's contention that Petitioner's claims have been procedurally defaulted. The Court of Appeals addressed this argument at length and indicated, in painstaking detail, how the questions presented have been preserved on direct appeal and in each habeas proceeding. (Pet. App. 27a-36a.) The Opposition Brief does not challenge the law applied by the court, but merely challenges the factual details. Notwithstanding any difference of opinion on the facts, the Commonwealth's deliberate or inadvertent failure to comprehend the scope of Petitioner's arguments at each of the prior proceedings does not constitute procedural default.

2. In claiming that the Petition does not raise constitutional issues, the Opposition Brief misstates the law and misperceives the questions presented in the Petition. The Petition does not contest that States are free to choose their own aggravating factors or that States may narrow the imposition of the death penalty during the guilt phase of capital murder. That does not suggest, however, that States may not employ a two-step process using broad factors during the guilt phase and then narrower factors during the penalty phase; indeed, many States have adopted such a scheme. Insofar as the Virginia General Assembly has chosen to require aggravating factors in sentencing and has limited them to vileness and future dangerousness, the fact that other States have adopted different approaches to aggravating circumstances has no probative weight here.

Furthermore, even if Virginia's predicates for capital murder were deemed to be aggravating circumstances for

purposes of Eighth Amendment narrowing, the vileness and future dangerousness aggravating factors in sentencing are still subject to constitutional requirements. In Virginia, a sentencing jury must find that a statutory aggravating factor is present before fixing the death sentence; this creates a due process obligation that the factor not be arbitrary or vague. In this very case, this Court affirmed Petitioner's conviction but remanded the case for resentencing. Surely the Eighth and Fourteenth Amendments require that the subsequent resentencing ordered by this Court not be arbitrary or capricious. The resentencing jury, however, had only the jury instructions elaborated in the Petition, and those instructions did not provide adequate guidance to avoid the arbitrary infliction of capital punishment.

3. *Godfrey v. Georgia*, 446 U.S. 420 (1980), struck down as unconstitutional a statutory provision identical to the one used in Virginia. The Virginia courts have consistently demonstrated a fundamental disregard for that opinion. The Opposition Brief goes even further, first arguing that constitutional review of Virginia's aggravating factors is unnecessary and irrelevant, and then dismissing the constitutional problems in the Virginia scheme summarily. In doing so, the Opposition Brief only underscores the inadequacy of a scheme that allows juries to sentence defendants to death if they find the presence of "moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."

Although the Opposition Brief cites several Fourth Circuit opinions for the proposition that the vileness aggravating factor passes constitutional muster, it does not address Petitioner's point that the Court of Appeals has never articulated a common-sense meaning for the depravity of mind instruction. Indeed, the Commonwealth's arguments that the Virginia Supreme Court and Fourth Circuit have repeatedly endorsed the Virginia scheme are simply one more indication that certiorari review is nec-

essary to resolve the problem. The patent lack of concern in the Opposition Brief for the scheme's constitutional problems testifies strongly to the importance of action by this Court.

The Opposition Brief does not offer a common-sense meaning for the depravity of mind jury instruction or explain how that instruction narrows the imposition of the death penalty. It does not even attempt to reconcile the opinion below with the conflicting holdings in other circuits on both the jury instructions and the appellate review necessary to save the aggravating factor. In short, it does not contest any of the reasons for granting certiorari review on this question.

4. With regard to the question of ineffective assistance of counsel, the Opposition Brief does not refute the Petition's showing that courts have disagreed often and with increasing frequency on the *per se* rule. Then-Judge Breyer's dissent in *Anderson v. Butler* recognized the tensions between those rulings and the *Strickland* test. This case offers the Court an excellent opportunity to resolve the issue.

CONCLUSION

For the foregoing reasons, and for the reasons set forth previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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